

RECEIVED

APR 10 2019

## COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

MAURA S. DOYLE CLERK  
 DEPT. OF SUPERIOR JUDICIAL COURT  
 FOR SUFFOLK COUNTY

**SUPERIOR COURT DEPARTMENT  
 OF THE TRIAL COURT  
 BARNSTABLE SUPERIOR COURT  
 DOCKET NO. 1772 CR 0107**

COMMONWEALTH OF MASSACHUSETTS

vs.

JASON MCCARTHY,

Defendant,

MEMORANDUM OF LAW  
 IN SUPPORT OF DEFENDANT'S  
 APPLICATION FOR  
 INTERLOCUTORY APPEAL

Issues Presented

1. The *Automatic License Plate Readers, hereafter (A.L.P.R.)*, on the Bourne and Sagamore Bridges, capture data/information and then electronically transmit it to stored, remote locations in the Commonwealth, therein constituting "*electronic communications*" as defined by and regulated by the *Electronic Communications Privacy Act, 18 U.S.C. sec. 2510-2522, and/or the Stored Communications Act, 18 U.S.C., 2701-2712*.
2. The Barnstable Police accessed and used the data of the *A.L.P.R.* system, collected over several months that *chronicled movements*, to conduct an investigation and to conduct a motor vehicle stop, violating the Defendant's reasonable expectation of privacy in the whole of his/her physical movements pursuant to the Fourth and Fourteenth Amendments to the United States Constitution, Article 14 of the Massachusetts Declaration of Rights, M.G.L. c.276, sec. 1 and 1B, and further violating his Right of Privacy pursuant to M.G.L. c.214, sec. 1B,
3. The data/information that is captured, stored and transferred by the *Automatic License Plate Readers, hereafter (A.L.P.R.)*, as well as, the mechanical, electronic, computer and communications system on the Bourne and Sagamore Bridges, is activity governed by the *Electronic Communications Privacy Act, 18 U.S.C. sec. 2510-2522, and/or the Stored Communications Act, 18 U.S.C., 2701-2712*, and accessing/use of the data/information without either a warrant, a court order, and/or probable cause is a violation of these Acts, and violated the Defendant's rights.
4. It was prejudicial error, in violation of 18 U.S.C. sec. 2518 (9), for the Motion's Hearing Judge to have allowed into evidence at the Motion hearing, evidence of the data/information captured by the *Automatic License Plate Readers (A.L.P.R.)*, without the Commonwealth having met the pre-requisites of the statutory scheme therein delineated in 18 U.S.C. sec. 2518 (9).
5. The *Massachusetts State Police General Order TRF-11, Effective Date: July 22, 2014, entitled Automatic License Plate Recognition*, that was adopted by the Barnstable Police Department, is not specific enough to the protect the rights of the Defendant and all citizens of the Commonwealth, therein allowing for general searches and seizures of information in which

the citizens of the Commonwealth have a reasonable expectation of privacy, specifically the whole of their physical movements, as well as, potential capture of personal information. It was error for the Motion's hearing Judge to have found that the Policy was constitutionally adequate pursuant to the Massachusetts Declaration of Rights and United States Constitution. Commonwealth v. Silva, 61 Mass. App. Ct. 28 (2004); Commonwealth v. Rostad, 410 Mass. 618 (1991); Commonwealth v. Bishop, 401 Mass. 449 (1988).

6. Through the use of Target Standing, the Defendant should have been allowed to challenge the actions of the Barnstable Police in that they engaged in "*distinctly egregious conduct*" in stopping the Defendant, who was the co-Target of their investigation. The drugs the Defendant is charged with distributing were found on the co-Target's person.

7. The Defendant, was ordered out of a car, placed in handcuffs, detained at the side of the road, placed in a police cruiser, taken to the Barnstable Police Department, and brought into an interrogation room in handcuffs. He was then questioned while handcuffed. He was confused by his true legal status, whether he was "*detained*", "*not under arrest*", "*arrestable*", "*not going to court*" there "*voluntarily*" or not. He was given inducements and false promises to make admissions. He was read his rights but told:

He was told: "*You are not under arrest. You are being detained and you are handcuffed.*"

He was told: "*Not booked and not placed under arrest. You are being detained.*"

He asked: "*How long am I being detained?*" and was told: "*You're here voluntarily at this point.*"

He asked: "*Are you's [sic] arresting me?*" and he was told: "*The ball's in your court. Everybody get's a bite at that apple. You haven't been charged yet. You still might be charged. Right now you haven't You are arrestable. You haven't given us any information.*" A. quid pro quo promise.

He asked: "*So now I need to go to Court?*" and he was told: "*You haven't been charged yet.*" What was his legal status?

He then asked: "*Why am I being held?*"

He was then told: "*We can arrest you today and you can decide whether you want to cooperate for information on this case or you can give us information now, and we can bring it to our boss and see if there is anyway we can charge you in the future, or not charge you at all, it depends on how good your information is. Tell us who your source is?*" Another quid pro quo promise.

He asks: "*Am I being let go?*" No answer was given.

Again he asked: "So how long am I being detained? How much time is this going to take? and he is told: "Depends on how much more information you want to give us. Well, even if we put a case on you now, you'd still be in a position to help us out. Or help yourself out."

The Barnstable Police secured admissions, all the while the Defendant never knowing his legal status so to be able to make an informed decision as to whether to assert his rights or not. The Defendant was then charged with these offenses.

8. The Barnstable Police illegally and without probable cause, interfered with the Defendant's right to bail by seizing the bail money that was brought to the Police station for him. They then independently applied so much of the same money to allow the release of a co-Defendant, while detaining the Defendant, and arbitrarily telling him he had to come-up with a second sum of money, equal to the first sum of bail money that had been set by the Bail Magistrate. The Bail Magistrate was not involved in the setting of the second sum nor in the seizure of the first sum. In so doing, the Barnstable Police violated Equal Protection clauses of the Massachusetts Declaration of Rights and the United States Constitution, the provisions of M.G.L. c.276, sec. 58, and illegally seized bail money in violation of the provisions of M.G.L. c.94C, sec. 47. The Barnstable Police also violated Article XXVI of the Massachusetts Declaration of Rights by imposing excessive bail in derogation of the Bail Magistrate's Order.

9. Reasonable suspicion, as well as, probable cause failed to exist to conduct a motor vehicle stop of the Defendant, to order him out of the car, to place him in handcuffs, and to transport him back to the Barnstable Police Department.

---

#### Summary of Facts

1. Prior to February 22, 2017, the Defendant became a Target of a drug investigation by the Barnstable Police Department of heroin/fentanyl being supplied.
2. Using several months of data obtained from the A.L.P.R's on the Bourne and Sagamore Bridges relative to the car operated by the Defendant, the Barnstable Police received a real time alert on February 22, 2017, that the car was coming over the bridge.
3. The Barnstable Police set up surveillance. Following the car, they observed the Defendant's vehicle drive down the end of a residential neighborhood road not known as a high crime area. They observed a Co-Defendant's car do the same. Not having the vantage point of witnessing a hand-to-hand or any exchange, the Police stopped both cars as they drove away in opposite directions.
4. Both the Defendant and the Co-Defendant were immediately removed from their vehicles and placed in handcuffs. The Co-Defendant was questioned. He told the Police he had

paid the Defendant for some marijuana he had purchased in the past. He was then pat-frisked and a finger of suspected fentanyl was felt in the back of his pants. He was taken to the Barnstable Police Department where it was removed. The Defendant, still standing on the side of the road, in handcuffs, was then put in a cruiser and taken to the Barnstable Police Department. His girlfriend, who was a passenger in his car, was also taken brought to the Police Department in handcuffs.

5. The Police interrogated all parties. The Defendant was read his rights and interrogated.
6. After the interrogation, all parties were charged criminally.
7. A Bail Magistrate was called. The Bail Magistrate set bail on the Defendant at \$10,000.00, with a \$40.00 fee for the Defendant and a \$40.00 fee for his girlfriend. The Defendant called his brother to secure the bail money. While the Defendant was talking to his brother, the Police were listening. The Brother appeared with the \$10,080.00. The bail money was seized by the Barnstable Police. The Defendant was held in custody and told he had to come up with an additional \$10,000.00 to be released. The Police then on their own volition, applied \$40.00 of the original \$10,000.00 to allow the Defendant's girlfriend to be released. The Defendant was held in custody until a subsequent sum of \$10,000.00 was brought to the Police Department, the Defendant then having tendered \$20,000.00 to secure his release.
8. Motions to Dismiss, and to Exclude Evidence, and to Suppress, and for the Return of the seized Money were filed by the Defendant.
9. Hearings were conducted by the Honorable Judge Robert C. Rufo. Live witness testimony and arguments were given.
10. After hearing and pursuant to written Findings of Fact and Rulings of Law, dated March 11, 2019, all Motions were denied.

#### Arguments

1. The *Automatic License Plate Readers, hereafter (A.L.P.R.)*, on the Bourne and Sagamore Bridges, capture data/information and then electronically transmit it to stored, remote locations in the Commonwealth, therein constituting "*electronic communications*" as defined by and regulated by the *Electronic Communications Privacy Act, 18 U.S.C, sec. 2510-2522, and/or the Stored Communications Act, 18 U.S.C., 2701-2712*.

2. The Barnstable Police accessed and used the data of the *A.L.P.R.* system, collected over several months that *chronicled movements*, to conduct an investigation and to conduct a motor vehicle stop, violating the Defendant's reasonable expectation of privacy in the whole of his/her physical movements pursuant to the Fourth Amendment to the United States Constitution, Article 12 of the Massachusetts Declaration of Rights, and further violating his Right of Privacy pursuant to M.G.L. c.214, sec. 1B.

3. The data/information that is captured, stored and transferred by the *Automatic License Plate Readers, hereafter (A.L.P.R.)*, as well as, the mechanical, electronic, computer and communications system on the Bourne and Sagamore Bridges, is activity governed by the *Electronic Communications Privacy Act, 18 U.S.C. sec. 2510-2522, and/or the Stored Communications Act, 18 U.S.C., 2701-2712*, and accessing/use of the data/information without either a warrant, a court order, and/or probable cause is a violation of these Acts, and violated the Defendant's rights.

4. It was prejudicial error, in violation of 18 U.S.C. sec. 2518 (9), for the Motion's Hearing Judge to have allowed into evidence at the Motion hearing, evidence of the data/information captured by the *Automatic License Plate Readers (A.L.P.R.)*, without the Commonwealth having met the pre-requisites of the statutory scheme therein delineated in 18 U.S.C. sec. 2518 (9).

#### Law and Analysis

The Electronic Communications Privacy Act, 18 U.S.C. sec. 2510 et seq., specifically section 2510 (12) defines an "*electronic communication*" as:

Any transfer or signs, signals, writing images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include:

- (A) any wire or oral communication;
- (B) any communication made through a tone-only paging device;
- (C) any communication from a tracking device;
- (D) electronic funds transfer information stored by a financial institution in a communication system used for the electronic storage and transfer of funds.

Section 2510 (15) defines an "*electronic communication service*" as "any service which provides to users thereof the ability to send or receive wire or electronic communications."

18 U.S.C. section 2518 provides the procedure for obtaining any wire, oral or electronic communications, requiring an written application for an order to a "judge of competent jurisdiction." Section 2518 (1).

Further, 19 U.S.C. section 2518 (9) specifically provides:

The contents of any wire, oral or *electronic communication* intercepted

pursuant to this chapter or evidence derived therefrom ***shall not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing or proceeding, has been furnished with a copy of the court order,*** and accompanying application, under which the interception was authorized or approved....

(Emphasis Supplied)

18 U.S.C. section 2518 (17) defines "*electronic storage*" as:

- (A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and
- (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication.

M.G.L. c.214, sec. 1B, defines the right of privacy for every citizen in the Commonwealth, specifically stating in relevant part that: 'A person shall have a right against unreasonable, substantial or serious interference with his privacy....' The United States Supreme Court in Carpenter v. U.S., 138 S. Ct. 2206 (2018), held that a person has an expectation of privacy pursuant to the Fourth Amendment in "*the whole of their physical movements.*" In Commonwealth v. Augustine, 467 Mass. 230 (2014), S.C., 470 Mass. 837 (2015), the Massachusetts Supreme Court held that a reasonable expectation of privacy exists for purposes of the article 14 of the Massachusetts Declaration of Rights and the Fourth Amendment in historical cell site location information.

The Massachusetts State Police own and maintained the Automatic License Plate Reader (A.L.P.R.) cameras on the Bourne and Sagamore Bridges, capturing data on every motor vehicle driving over the Bourne and Sagamore Bridges. The system, electronically transmits this data to remote locations in the Commonwealth, where it is then electronically stored on computers for use by end users. The General Order of the Massachusetts State Police does not specify how long the data shall be maintained, nor anything specific to the process for obtaining it, or that judicial

intervention is necessary. The data, is then capable of being accessed by law enforcement departments, specific to this case the Barnstable Police Department, without any prior judicial authorization, probable cause finding, or search warrant requirement. The Barnstable Police Department, using months of the A.L.P.R. historical data as part of a reasonable suspicion calculus, affected a stop of Mr. McCarthy, after receiving a real time alert that the vehicle was traveling over the bridge and surveilling it. The data transmissions, the storage and the access to it are governed by the Electronic Stored Communications Act and/or the Stored Communications Act.

At the Hearings on the Defendants' Motions, the Motion Judge allowed into evidence, testimony regarding the A.L.P.R. data despite the fact that the Commonwealth had failed to comply with the requirements of Judicial order and provision of the order and records to the Defense at least "10 days prior to" the hearing, therein violating the Defendants' rights, and prejudicing the hearing evidence.

---

5. The *Massachusetts State Police General Order TRF-11, Effective Date: July 22, 2014, entitled Automatic License Plate Recognition*, that was adopted by the Barnstable Police Department, is not specific enough to the protect the rights of the Defendant and all citizens of the Commonwealth, therein allowing for general searches and seizures of information in which the citizens of the Commonwealth have a reasonable expectation of privacy, specifically the whole of their physical movements, as well as, potential capture of personal information. It was error for the Motion's hearing Judge to have found that the Policy was constitutionally adequate pursuant to the Massachusetts Declaration of Rights and United States Constitution.

#### Law and Analysis

Law enforcement department policies and procedures that are not maintained, written, or specific relative to the search and seizure of individuals and their property have been generally held to be unconstitutional under both the State and Federal Constitutions. See Commonwealth

v. Silva, 61 Mass. App. Ct. 28 (2004) (Cocaine seized during a warrantless automobile search was error for failure of the Commonwealth to establish the existence of a constitutionally adequate written policy providing an automatic justification for police entry of a vehicle to be towed); Commonwealth v. Rostad, 410 Mass. 618 (1991) (A written policy governing police inventory searches, directing officers to "search the arrestee and make an inventory of all items collected" did not extend to the opening of a closed container, requiring the exclusion of drugs seized in the inventory search); Commonwealth v. Bishop, 402 Mass. 449 (1988) (Article 14 of the Declaration of Rights requires suppression of the contents of a zippered hand bag during an inventory search not conducted pursuant to standard police procedures); Commonwealth v. McGeoghegan, 389 Mass. 137 (1983) (The stopping of a motor vehicle at a roadblock is a seizure within the Fourth and Fourteenth Amendments of the United States Constitution, and must be conducted pursuant to the details of a specific plan devised by law enforcement supervisory personnel, and strictly followed)

The General Order governing the A.L.P.R. system owned and operated by the Massachusetts State Police, is not specific enough to constitutionally protect the rights of all citizens. Testimony was provided during the Motions hearing, that this policy was allegedly "adopted" by the Barnstable Police Department; however, there was no submission of a Barnstable Police Department document indicating the existence of a department policy.

---

6. Through the use of Target Standing, the Defendant should have been allowed to challenge the actions of the Barnstable Police in that they engaged in "*distinctly egregious conduct*" in stopping the Defendant, who was the co-Target of their investigation. The drugs the Defendant is charged with distributing were found on the co-Target's person.

Law and Analysis



In Commonwealth v. Amendola, 406 Mass. 592 (1990), the Court announced that it was adopting the Automatic Standing rule, further announcing that the rule should only be extended where possession crimes were in issue.

The Court in Commonwealth v. Frazier, 410 Mass. 235 (1991), announced that a defendant charged with trafficking in cocaine was deemed to have "automatic standing" to contest the legality of the search of a codefendant's handbag and the seizure of cocaine from the handbag, even though he neither had physical possession of it nor was present at the location of the search, where possession is an essential element of the charges against the Defendant.

And in Commonwealth v. Scardamaglia, 410 Mass. 375 (1991), the Court held that it was not going to adopt the concept of "target standing." The Defendant sought to suppress evidence found on another individual who indicated that he had just purchased the cocaine from the Defendant.

In Commonwealth v. Negron, 85 Mass. App. Ct. 904 (2014), the Court held that a person charged with distribution of a controlled substance, does not have standing to challenge the search and seizure of the alleged buyer.

On February 22, 2017, the Defendant, Jason McCarthy was arrested after illegal drugs were found on his Co-Defendant, Brian Whitmore, Sr.. He was charged with Distribution, 2<sup>nd</sup> and subsequent offense. The Commonwealth seeks to prove that the Mr. McCarthy actually and constructively possessed the drugs found, contrast in Negron.

The Barnstable Police engaged in "distinctly egregious conduct," in stopping Jason McCarthy without reasonable suspicion and in arresting him without probable cause. Jason McCarthy was

clearly the target of their investigations as testified during the Motions hearing. The tangible evidence obtained from Whitmore will be used to introduced against McCarthy, and forms the basis for the charges against McCarthy.

---

7. The Defendant, was ordered out of a car, placed in handcuffs, detained at the side of the road, placed in a police cruiser, taken to the Barnstable Police Department, and brought into an interrogation room in handcuffs. He was then questioned while handcuffed. He was confused by his true legal status, whether he was "*detained*", "*not under arrest*", "*arrestable*", "*not going to court*" there "*voluntarily*" or not. He was given inducements and false promises to make admissions.

#### Law and Analysis

Where a defendant challenges the admission of a statement allegedly resulting from custodial interrogation, the defendant bears the initial burden of proving custody. "The crucial question in determining whether an interrogation is custodial is whether "a reasonable person in the defendant's position would have believed that he was in custody." Commonwealth v. Damiano, 422 Mass. 10 (1996). Fifth Amendment rights precede custodial interrogation. Commonwealth v. Hilton, 443 Mass. 597, 608 (2005), S.C., 450 Mass. 173 (2007). The Court in Commonwealth v. Groome, 435 Mass. 201, 211-212 (2001) listed four factors indicative of custody:

In assessing the circumstances, the court considers several factors: (1) the place of the interrogation; (2) whether the officers have conveyed to the person being questioned any belief or opinion that that person is a suspect; (3) the nature of the interrogation, including whether the interview was aggressive or, instead, informal and influenced in its contours by the person being interviewed; and (4) whether, at the time the incriminating statement was made, the person was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with an arrest. Commonwealth v. Morse, 427 Mass 117, 121-127 (1998). Commonwealth v. Bryant, 390 Mass. 729, 737 (1984)

Commonwealth v. Larkin, 429 Mass. 426, 432 (1999). If the Defendant meets the initial burden,

the burden shifts to the Commonwealth to proving "a knowing, intelligent, voluntary waiver of Miranda rights," Commonwealth v. Murphy, 442 Mass. 485, 492 (2004), and that any statement "was made voluntarily." Commonwealth v. Tremblay, 460 Mass. 199, 206 (2011). The voluntariness of a *Miranda* waiver and the voluntariness of particular statements made during custodial interrogation "are separate and distinct issues"; however, the test is essentially the same. Commonwealth v. Edwards, 420 Mass. 666, 670 (1995). As stated by the Court in Commonwealth v. Tremblay, 460 Mass. 199 (2011):

The test for voluntariness is whether, in light of the totality of the circumstances surrounding the making of the statement, the will of the defendant was overborne to the extent that the statement was not the result of a free and voluntary act .... [The Court] consider[s] all of the relevant circumstances surrounding the interrogation and the individual characteristics and conduct of the defendant," including promises and other inducements, conduct of the defendant, the defendant's age, education, intelligence and emotional stability, experience with and in the criminal justice system, physical and mental condition, the initiator of the discussion of a deal or leniency (whether the defendant or the police), and the details of the interrogation, including the recitation of Miranda warnings.

See also Commonwealth v. DiGiambattista, 442 Mass. 423 (2004); Commonwealth v. Baye, 462 Mass. 246 (2012), quoting Dickerson v. United States, 530 U.S. 428, 434 (2000), quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). "The long-standing principle [exists] that, where the Commonwealth intends to rely on a defendant's confession to a crime, it must bear the "heavy burden of establishing that [the confession] was voluntary." Commonwealth v. Meehan, 377 Mass. 552, 563 (1979), cert. dismissed, 445 U.S. 39 (1980), and it "must be shown beyond a reasonable doubt." Commonwealth v. Hoyt, 461 Mass. 143 (2011). Commonwealth v. Tremblay, 460 Mass. 199 (2011).

The United States Supreme Court in Missouri v. Seibert, 542 U.S. 600, 608 (2004) stated:

In *Miranda* we explained that the "voluntariness doctrine in the

state cases ... encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice ... and recognized that "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk" that the privilege against self-incrimination will not be observed. Hence our concern that the "traditional totality-of-circumstances" test posed an "unacceptably great" risk that involuntary custodial confessions would escape detection.

The Court in Commonwealth v. Newson, 471 Mass. 222 (2015), stated that a false representation at the beginning that the Defendant was not under arrest constituted an instance of "deceit" and "trickery" that is an element pointing toward statements being declared involuntary. "Absent some indication that the defendant was particularly vulnerable to suggestion, the focus of our inquiry has been on whether incriminating statements were "the result of coercion or intimidation." Commonwealth v. Baye, 462 Mass. 246, 256 (2012). "It is the Commonwealth's burden to prove beyond a reasonable doubt, ... that the improper tactics were not "so manipulative ... that they deprived [the defendant] of his ability to make an unconstrained, autonomous decision to confess." Commonwealth v. Baye, 462 Mass. 246, 256 (2012). "[W]here the police obtain a confession by misrepresenting the defendant's fundamental constitutional rights, it will be "extremely difficult for the Commonwealth" to demonstrate voluntariness "in any case." Commonwealth v. Baye, 462 Mass. 246, 257, quoting Commonwealth v. Novo, 442 Mass. 262, 269 (2004).

Jason McCarthy was read his rights but told:

He was told: *"You are not under arrest. You are being detained and you are handcuffed."*

He was told: *"Not booked and not placed under arrest. You are being detained."*

He asked: *"How long am I being detained?"* and was told: *"You're here voluntarily at this point."*

He asked: "Are you's [sic] arresting me?" and he was told: "The ball's in your court. Everybody get's a bite at that apple. You haven't been charged yet. You still might be charged. Right now you haven't You are arrestable. You haven't given us any information." A quid pro quo promise.

He asked: "So now I need to go to Court?" and he was told: "You haven't been charged yet." What was his legal status?

He then asked: "Why am I being held?"

He was then told: "We can arrest you today and you can decide whether you want to cooperate for information on this case or you can give us information now, and we can bring it to our boss and see if there is anyway we can charge you in the future, or not charge you at all, it depends on how good your information is. Tell us who your source is?" Another quid pro quo promise.

He asks: "Am I being let go?" No answer was given.

Again he asked: "So how long am I being detained? How much time is this going to take? and he is told: "Depends on how much more information you want to give us. Well, even if we put a case on you now, you'd still be in a position to help us out. Or help yourself out."

The Barnstable Police secured admissions, all the while the Defendant never knowing his legal status so to be able to make an informed decision as to whether to assert his rights or not. The Defendant was then charged with these offenses.

---

8. The Barnstable Police illegally and without probable cause, interfered with the Defendant's right to bail by seizing the bail money that was brought to the Police station for him. They then independently applied so much of the same money to allow the release of a co-Defendant, while detaining the Defendant, and arbitrarily telling him he had to come-up with a second sum of money, equal to the first sum of bail money that had been set by the Bail Magistrate. The Bail Magistrate was not involved in the setting of the second sum nor in the seizure of the first sum. In so doing, the Barnstable Police violated Equal Protection clauses of the Massachusetts Declaration of Rights and the United States Constitution, the provisions of M.G.L. c.276, sec. 58, and illegally seized bail money in violation of the provisions of M.G.L. c.94C, sec. 47. The Barnstable Police also violated Article XXVI of the Massachusetts Declaration of Rights by imposing excessive bail in derogation of the Bail Magistrate's Order.

Law and Analysis

The Defendant relies as persuasive authority on the analysis and citations made by Judge Agnes in Commonwealth v. Negron, Massachusetts Superior Court, June 23, 2005, ESCR2005-494, and specifically further states the following.

M.G.L. c.94C, sec. 47 sets forth a comprehensive scheme for the seizure and forfeiture of property. Specifically, M.G.L. c.94C, sec. 47(f)(1) mandates that the police obtain a warrant from a judicial officer before they may seize property for forfeiture: "Process for seizure of said property shall issue only upon a showing of probable cause, and the application therefor and the issuance, execution, and return thereof shall be subject to the provisions of chapter two hundred and seventy-six, so far as applicable." Searches and seizures performed in derogation of the warrant requirements are presumed unreasonable and the burden is on the government "to show that a particular search falls within a narrow class of permissible exceptions." Commonwealth v. Antobenedetto, 366 Mass. 51, 57 (1974). Commonwealth v. Cavanaugh, 366 Mass. 277, 279 (1974). "The Commonwealth must show probable cause ... for a forfeiture to a neutral magistrate." Commonwealth v. Agosto, 428 Mass. 31 (1998). "Probable cause" under Massachusetts law requires a "demonstrable nexus" between drugs and the property seized, and suspicion, conjecture and hunch is not sufficient to justify the seizure. Commonwealth v. Seven Thousand Two Hundred Forty Six Dollars, 404 Mass. 763 (1989). Commonwealth v. Fourteen Thousand Two Hundred Dollars, 421 Mass. 1 (1995).

M.G.L. c.276, sec. 58, guarantees the right to a person held under arrest, to be admitted to bail on his personal recognizance without surety *unless a "justice, clerk or assistant clerk, bail commissioner or master in chancery determines*, in the exercise of his discretion, that such release will not reasonably assure the appearance of the person before the court." *A cash bail*

*may be set by the "justice or clerk or assistant clerk of the district court, the bail commissioner or master in chancery."*

Article XXVI of the Massachusetts Declaration of Rights, provides in relevant part: "No magistrate or court of law, shall demand excessive bail or sureties ...."

Massachusetts Courts have stated "a defendant must show prejudice in order to justify dismissal of charges with prejudice." Commonwealth v. Viverito, 422 Mass. 228 (1996)." Typically for dismissal to be the chosen remedy, the Court's have required the Defendant to show prejudice or a threat thereof, relative to "evidence to be adduced at trial" versus an interference with a liberty interest. "Prejudice required for dismissal focuses on the subsequent trial and the interference with procedural rights therein." Commonwealth v. Viverito, 422 Mass. 228 (1996).

However, also firmly established is that "[t]he equal protection of the Fourteenth Amendment ... and articles 1 and 10, [of the Massachusetts Declaration of Rights] ... prohibit discriminatory application of impartial laws." Commonwealth v. Franklin Fruit Co., 388 Mass. 228 (1983). Commonwealth v. Lora, 451 Mass. 425 (2008). Yick Wo v. Hopkins, 118 U.S. 356 (1886). Dismissal of criminal complaints have occurred due to deliberate and selective enforcement based on arbitrary and impermissible standards that are violative of the Equal Protection principles. Commonwealth v. King, 374 Mass. 5 (1977). Com. v. Franklin, 376 Mass. 885 (1978). See also Commonwealth v. Light, 394 Mass. 112, 114 (1985) ("Where prosecutorial misconduct constitutes a deliberate and intentional undermining of constitutional rights ... the drastic remedy of dismissal of charges may be appropriate."). As a general rule, ***"any violation of a constitutional right gives rise to presumptive prejudice,*** which normally requires a reversal of the conviction, in the absence of an affirmative showing by the Commonwealth, that the error

was harmless," Commonwealth v. McDonald (No. 1), 368 Mass. 395, 399 (1975)."

Commonwealth v. Manning, 373 Mass. 443 (1977). Commonwealth v. Cronk, 396 Mass. 194,

198-199 (1985) ("Under the alternative principle, prosecutorial misconduct that is egregious, deliberate, and intentional, or that results in a violation of constitutional rights may give rise to presumptive prejudice. In such instances prophylactic considerations may assume paramount

importance ...."). "Prophylactic considerations assume paramount importance in fashioning a remedy for deliberate and intentional violations of constitutional rights. Such deliberate

undermining of constitutional rights must not be countenanced." Commonwealth v. Manning,

373 Mass. at 444 (1977) (Deliberate denial of right to counsel by Officers, led to reversal of judgment of Superior Court and finding of guilt set aside, and indictment being dismissed with prejudice). "[P]olice acting as prosecutors, are held to the same prosecutorial standard...."

Commonwealth v. Light, 394 Mass. 112 (1985); Commonwealth v. Redding, 382 Mass. 154, 157

(1982) ("The police are also part of the prosecution, and the taint on the trial is not less if they, rather than the State's Attorney, were guilty of nondisclosure." Commonwealth v. St. Germain,

381 Mass. 256, 261 n. 8 (1980)"). Commonwealth v. Lam Hue To, 391 Mass. 301 (1984).

An alternative to dismissal is exclusion of evidence. "The substantial, and perhaps only, justification for the exclusionary rule relied on by a majority of the Justices of the Supreme Court is the goal of deterring unconstitutional conduct by the police and other law enforcement

personnel. See Stone v. Powell, 428 U.S. 465 (1976); United States v. Calandra, 414 U.S. 338

(1974). "The exclusionary rule is a "judicially created means of effectuating the rights secured by the Fourth Amendment." Commonwealth v. Shepard, 387 Mass. 488, 501 (1982), quoting

Stone v. Powell, 428 U.S. 465 (1976). The unlawful seizure of property that is not per se illegal,

invokes the exclusionary rule. See One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693



(1965); Commonwealth v. Nine Hundred and Ninety Two Dollars, 383 Mass. 764 (1981), "*At a minimum, the application of the exclusionary rule deprives the government of evidence gathered after the illegal seizure, including the evidentiary value of the items that were seized, see United States v. \$191,910.00 in United States Currency*, 16 F.3d 1051 (1994), and may be grounds for the dismissal of the forfeiture proceedings. See Berkowitz v. United States, 340 F.2d 168 (1<sup>st</sup> Cir. 1968) (Seizure of money from an individual without probable cause and without any other justification contravenes public policy and bars a subsequent forfeiture)."

9. Reasonable suspicion, as well as, probable cause failed to exist to conduct a motor vehicle stop of the Defendant, to order him out of the car, to place him in handcuffs, and to transport him back to the Barnstable Police Department.

#### Law and Analysis

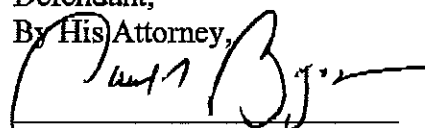
The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, bestows to the people the right "to be secure in their *persons*, houses, papers, and effects against *unreasonable* searches and *seizures*...." (emphasis supplied) United States v. Dionisio, 410 U.S. 1 (1973); Schmerber v. California, 384 U.S. 757 (1966). Ordinarily, for a seizure to pass Constitutional scrutiny under both the Fourth Amendment's and Article 14's hovering presence, the seizure must be premised on *probable cause*, ... *probable cause* to believe that a crime has been, will be, or is being committed. See, e.g., Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973); Sibron v. New York, 392 U.S. 40, 62-66 (1968); Beck v. Ohio, 379 U.S. 89, 91 (1964). See also Commonwealth v. Upton, 394 Mass. 363, 370 (1985); Commonwealth v. Antobenedetto, 366 Mass. 51, 57 (1974). The Court in Terry v. Ohio, 392 U.S. 1 (1968), defined a "seizure" as follows: [A] "seizure" occurs "whenever a police officer accosts an individual and restrains his freedom to walk away."

Subsequent United States Supreme Court opinions have announced that a "seizure" occurs when a police officer, by means of physical force or show of authority, intentionally, Brower v. Inyo County, 489 U.S. 593 (1989), restrains the individual's liberty in such a manner that, in view of all the circumstances surrounding the incident, a reasonable person would believe that he is not free to leave. United States v. Brignoni-Ponce, 422 U.S. 873 (1975); United States v. Mendenhall, 446 U.S. 544, reh'g denied, 448 U.S. 908 (1980); Florida v. Royer, 460 U.S. 491 (1983). As the Court in Florida v. Bostick, 111 S.Ct. 2382, 2388 (1991), later announced : "[The] reasonable person ...pre-supposes an innocent person." The Court in Florida v. Bostick, 111 S.Ct. 2382, at 2386 (1991), further noted that the conveyance of a message by the police that a person must comply with their requests, is a restraint upon that person's liberty. The Massachusetts Courts adhere to the same principles. See Commonwealth v. Marrero, 33 Mass. App. Ct. 440 (1992); Commonwealth v. Laureano, 411 Mass. 708 (1992); Commonwealth v. Thibreau, 384 Mass. 762 (1981). In Terry v. Ohio, 392 U.S.1 (1968), the Court created an exception to the "probable cause" standard in announcing that "reasonable suspicion," United States v. Sokolow, 109 S.Ct. 1581, 1585 (1989), is required for a less than ordinarily-intrusive seizure of a person. Commonwealth v. Wren, 391 Mass. 705 (1984); Commonwealth v. Thibreau, 384 Mass. 762 (1981). "Some minimal level of objective justification," I.N.S. v. Delgado, 466 U.S. 210, 217 (1984), is required to justify a Terry-type stop, derived at by assessing "the totality of the circumstances - the whole picture." United States v. Cortez, 449 U.S. 411, 417 (1981), reh'g denied, 455 U.S. 1008 (1982). *A "police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion."* Terry v. Ohio, 392 U.S. 1 (1968). *The "reasonable suspicion" cannot be based on "inchoate and unparticularized suspicion or 'hunch[es]'"* Terry v. Ohio, 392 U.S. 1, at 27

(1968). The first issue, is whether the officer had a right to "forcibly-stop" - "seize" - the suspect. This issue will be determined by assessing the articulable facts and circumstances relied upon by the officer. Commonwealth v. Borges, 395 Mass. 788 (1985); Commonwealth v. Wren, 391 Mass. 705 (1984); Commonwealth v. Thibault, 384 Mass. 762 (1981). If the stop is so intrusive as to amount to an "arrest" of the person, probable cause must exist to believe that the person was committing, did commit, or would be committing a criminal act. Dunaway v. New York, 442 U.S. 200 (1979); Brinegar v. United States, 338 U.S. 160, reh'g denied, 338 U.S. 839 (1949); Carroll v. United States, 267 U.S. 132 (1965); Commonwealth v. Petrillo, 399 Mass. 487, 490-491 (1987); Commonwealth v. Hason, 387 Mass. 169, 174 (1982); Commonwealth v. Olivares, 30 Mass. App. Ct. 596 (1991).

The Barnstable Police stopped and seized Mr. McCarthy, after finding evidence on Brian Whitmore, Sr.. Brian Whitmore, Sr., was asked why he had met with Jason McCarthy and he told the Police he had just paid him for marijuana that had been purchased in the past. The Police knew that both vehicles had met; however, during the Motion hearing it was revealed that they could neither see the vehicles nor witnessed an exchange between McCarthy and Whitmore. As soon as they drove away, the Police based on nothing more than suspicion, stopped the vehicles.

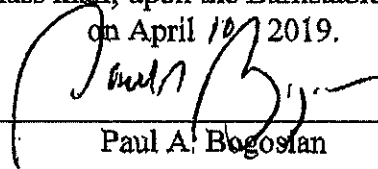
Respectfully Submitted,  
Jason McCarthy,  
Defendant,  
By His Attorney,



Paul A. Bogosian  
Attorney At Law  
191 Main Street  
P.O. Box 288  
Wareham, MA 02571  
Tel. 401.474.8330  
BBO #561068

**CERTIFICATE OF SERVICE**

I, Paul A. Bogosian, Attorney At Law hereby certify that a true and accurate copy of this Document was served via 1<sup>st</sup> class mail, upon the Barnstable County District Attorney's Office on April 10, 2019.

  
\_\_\_\_\_  
Paul A. Bogosian